very often. As I say, in the private sector, people are forced to change from time to time in order to continue to be effective and to continue to modernize. I do not think it is reasonable to think that a program that started in the 1950s, and it is now 2003, that that program is being done as efficiently as it might be. I frankly sometimes think it would be a good idea if the various things we pass that go into some kind of services, some kind of activity, should expire and we should have to go through the process of reexamining what that operation is doing and if it is still needed—and it may or may not be—then see if it is being done in the most efficient way possible.

There are operations in the Government, of course, that are designed to do that, such as OMB, the Office of Management and Budget, but it is very difficult.

I am pleased that President Bush has a modernization program going, but there is all kinds of resistance. The resistance can be political: If it does not happen to suit one's particular community as a politician, why, they are opposed to that. I think it is fair to say clearly that the labor union leaders who are involved with Government unions are overreacting to the idea that some things ought to be made available to be done in the private sector, which I think is a very reasonable thing to do.

We now have sort of an overstatement of things that are trying to be done in the National Park Service. Well, there should be a few things that are competitive with the private sector, but the whole Park Service is not going to be turned over to the private sector. No one has suggested that, but that is the kind of thing we get.

I do think we ought to pay a little more attention to how we could make the delivery of services more efficient and how we could review the services that are being delivered to see if indeed they are in keeping with the times. That has to be done in a special way because it just does not happen automatically. Politics keeps it from happening. The complexity keeps it from happening. Sometimes labor unions are resistant to any change. I think it is our responsibility, and I intend to continue to look for opportunities, to examine, evaluate, and try to move forward in making the delivery of essential services more efficient whenever possible.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Idaho.

Mr. CRAIG. Mr. President, I understand we are to resume debate on S. 14 at 10?

The ACTING PRESIDENT pro tempore. That is correct.

Mr. CRAIG. The chairman of the committee who is managing the bill is not yet on the floor. Until he comes, I ask unanimous consent to speak as in morning business for no more than 10 minutes.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. REID. Mr. President, reserving the right to object, I wonder if the bill should be reported and then go into morning business.

Mr. CRAIG. I am going to talk on energy, anyway, so we could do that. I would withdraw my UC.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

ENERGY POLICY ACT OF 2003

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of S. 14, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 14) to enhance the energy security of the United States, and for other purposes.

Pending:

Feinstein amendment No. 876, to tighten oversight of energy markets.

Reid amendment No. 877 (to amendment No. 876), to exclude metals from regulatory oversight by the Commodity Futures Trading Commission.

The ACTING PRESIDENT pro tempore. The Senator from the great State of Idaho.

Mr. CRAIG. Mr. President, we are now resuming debate on S. 14, the national energy policy for our country. I have been on the floor several times over the last number of weeks as we have debated different amendments. Yesterday, there were a couple of critical votes as it related to nuclear. We have a derivatives amendment at this time by the Senator from California, and I think the Senator from Nevada has a second degree on it.

A fundamental question again emerges, and emerged yesterday at a hearing on the Hill, with the statement of our Federal Reserve Chairman Alan Greenspan as to the importance of a national energy policy.

Why is the Chairman of the Federal Reserve, who is interested in the prime rate and the management of monetary supply of our country, concerned about energy? It is fundamental why he is concerned about energy. He is concerned about the economy of our country and its strength, stability, and ability to grow and provide jobs for the men and women who currently do not have them, and to strengthen and stabilize those jobs for the men and women who currently do have jobs.

What was he talking about yesterday? He was talking about one of the primary feed stocks for energy in our country, natural gas; the problems that we currently have with the supply of natural gas because this country has not effectively explored and developed, for a variety of reasons, our natural gas supply.

In the context of not providing supply, we have provided extraordinary demands on the current supply. Under the Clean Air Act, to meet those clean air standards, and out in the Western States and those air sheds specifically, the only way you can meet those standards and bring a new electrical generating plant on line is to choose to use gas to fire a turbine, to generate electricity. That is a tremendously inefficient way to use the valuable commodity of natural gas, but that is exactly what the Federal Government has told our utilities over the last two decades: If you are going to bring a new generation on line, it will be a gas-fired electrical turbine. Coal has problems; we are working on clean coal technology. This legislation embodies trying to get us to a cleaner technology to fire the coal electrical generation in our country.

As a result, what are we talking about? What has been said and what we believe to be true is that there is now rapidly occurring a major shortage in natural gas. As a result, that is not only going to drive up the cost to the consumer in his or her individual home—and I will read from an article: Another witness, Donald Mason, head of the Ohio Public Utilities Commission, predicted that the average residential heating bill next winter will be at least $220 higher per household than last winter.

That is a real shock to an economy and to a household and why Alan Greenspan is obviously worried that you spread that across a consuming nation, and we are talking about hundreds of millions of dollars pulled out of the economy to go to the cost of heating when it had not been the case before. That was one of the concerns.

The other concern is the tremendous price hike we are seeing at this time and the impact that will have. Gas prices have nearly doubled in the past year to about $6.31 per Btu, and there is a 25-percent change expected. We expect prices to peak and we have seen one instance, about 3 months ago, over a 200-percent increase in the price of natural gas as a spike in the market.

S. 14 is legislation to help facilitate the construction of a major delivery system out of Alaska. In Alaska at this moment we are pumping billions of Btu's of gas back into the ground because we simply cannot transport it to the lower 48 States, and we do not want to flare it into the atmosphere as has been the approach in the past in gasfields. It is too valuable a commodity, and we do not want to do that to the environment.

We have also looked at other opportunities for access. Part of the difficulty today is delivery systems and building gas pipelines across America. This legislation has provisions to help facilitate more of that as it relates to right of way and, of course, the recognition of the environmental need and the consequence and appropriate adjustment there.

What Alan Greenspan underlines in his comments, what Donald Mason

from the Ohio Public Utilities Commission underlines, was what Spence Abraham said last Friday when he called for a June 26 meeting of the National Petroleum Council to talk about this impending gas shortage crisis: Our country needs a national energy policy.

I hope all of my colleagues rally to that reality. Why should we force upon the American consumer a $200- or $300-increase in their energy costs next year simply because this Senate and this Congress will not do its work or can't do its work? We debated mightily a year ago an energy policy. We got it to a conference. The differences were too great. Ultimately, we could not arrive at a final product to go to our President's desk.

What Senator DOMENICI has done as chairman of the Energy and Natural Resources Committee is craft a broad-based national energy policy that is as much production as it is conservation. It is as much new technology as it is the advancement and the improving of existing technology. It is truly a broad-based national energy policy for our country. More gas? Yes. More coal usage? Yes. More wind usage? Yes. More photovoltaic or sunlight usage? You bet. The development of new, safe, clean, more effective utilization of nuclear? Absolutely. Why shy away from any energy source at this moment when we are forcing them on the American consumer and the economy of this country is increasing costs in the area of energy?

Lastly, when we do all of that and we drive up the costs of the job itself and the cost of the product produced by that job, we make ourselves increasingly less competitive around the world.

I was out in the Silicon Valley this weekend. I met with 50 CEOs of high-technology companies in San Jose. They are interested in a lot of issues, but their No. 1 issue is energy and the ability to know that when they build a plant in this country, whether it is in California or in any other State, they are going to be guaranteed a supply of high-quality constant energy. The reality is when they do not have it, they will shop elsewhere to build that plant. If they can't get quality sustainable energy in this country, then they will go elsewhere. That means U.S. jobs go to some other country.

Shame on us as a country for having failed for the last decade to produce a national energy policy, and in failing to do so, bringing Alan Greenspan to the Hill to talk about an impending energy crisis again in domestic supply of gas, and to have a utility commissioner talk about a $220-per-year increase in the cost of heating the average American home by natural gas.

Less food on the table, less money in the college trust fund for the children—all of those could be the consequence of a home that is unemployed, a home that has to choose between staying warm and doing other things. In a cold winter, ultimately, they will want to stay warm and they will have to pay their heating bill. We should not ask Americans to make that choice if it is our failure to produce a national energy policy and to produce energy that has caused them to have to make that choice. That is the issue.

I hope the Senate will expedite the passage of S. 14. We have been on it now nearly 4 weeks, 3 weeks to be exact. We are being told there are hundreds of amendments out there. There are not hundreds of amendments on this side of the aisle. There are a few. We ought to ask, and I hope we can get by the end of business this week, a finite list and a unanimous consent that will bring this issue together so we can say to our colleagues and to the American people: The Senate is ultimately going to vote on this legislation, help produce a national energy policy, get it into conference with the House, and get it on the President's desk as soon as we possibly can.

Not only does the absence of a national policy have a negative impact on our economy, the presence of one—this legislation—could have a tremendously positive impact. Many have said in the analysis of S. 14, there are 500,000 new jobs in this legislation alone. That could be more jobs that would be created over the next 10 years by this legislation than could be created by the economic stimulus package, although we believe that will have a tremendously positive impact.

That is why we are here in the Chamber debating it. I am frustrated by those who say: Oh, no, not now; we can't do this; we can't do that; or we have hundreds of amendments; or we are obstructing or dragging our feet.

Let's get a unanimous consent agreement. Let's get Senators to bring those amendments to the floor. I am certainly willing to debate them. I think we ought to vote on them. The American people ought to sort us out and see who is for energy production in this country, who is for driving down the projected costs to the average home when it comes to their heating bill, who is in favor of creating hundreds of thousands of new jobs in clean technology, environmentally sound technology, and making this Nation once again self-reliant in the area of energy.

S. 14 is critical legislation. We ought to be voting on it now. We ought not be dragging our feet or, in some instances, obstructing. The debate is critical. Senators, bring your amendments to the floor. The chairman has pleaded with us time and time again to craft a unanimous consent agreement. The Senator from Nevada, the whip for Democrats, has worked with us to try to get a unanimous consent agreement. If, on Friday, we cannot produce a unanimous consent agreement of the body of amendments that will finally be offered and debated on this bill, then it begins to look as if somebody is obstructing this process, somebody simply does not want it to go forward in an effective way to finalize and produce for this country a national energy policy.

I certainly hope we can get on with the business that the Senate does best—get to the floor, debate the issues, offer the amendments, vote on them, and ultimately get this legislation to our President's desk so our country can once again stand tall and strong in the field of energy.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I say to the distinguished Senator from Idaho, we will, as I indicated to the majority leader today, have a list sometime today, a finite list of amendments on our side. I would also say the holdup, the slowdown on this bill in the last 24 hours is not anything that we on this side have done. Senator FEINSTEIN has offered an amendment. That amendment needs to be disposed of before we move forward. I hope the majority will make a decision in the near future as to what they want to do with that amendment.

As indicated, I filed an amendment—I am confident my friend from Idaho would agree with it—to exempt from her amendment minerals, which are such an important part of the American West. They have agreed to accept that amendment. Senator FEINSTEIN has agreed to accept the amendment—not, I am sure, because she likes the amendment a lot but because she realizes what happened when there was a vote on this last year.

I hope that amendment will be accepted, the majority will allow that amendment to be accepted, and we can move forward on the Feinstein amendment with an up-or-down vote or move to table, whatever they decide to do on it, but let's move on.

Senator FEINSTEIN, for example, has other amendments she wishes to offer. She has one dealing with CAFE standards. That was debated last time, but I am sure we will have to debate it this time. But we should move forward on this legislation.

I want the record simply to reflect we are not holding up this legislation. I have made public statements here, with the full knowledge of the Democratic leader, that we are cooperating on this Energy bill in the very best way we can. As we know, last year when we had this bill up, there were 8 weeks of debate, approximately 125 amendments, and we had 35 recorded votes. I hope we need not do that this time. I hope we can condense things and do it in fewer than 8 weeks.

I also said publicly I appreciate very much how Senator FRIST has handled the bills generally since he has taken the leadership of the Senate—not filing cloture immediately. As long as we are cooperating, which we are on this, offering substantive amendments, he has been very good about allowing debate to go forward.

We continue, on this measure, to cooperate with the majority. We will

move forward with this most important legislation. I agree with the Senator from Idaho, this country needs an energy policy. I underline, underscore this. I didn't hear all his remarks, I was called off the floor, but I did hear some of his statements regarding alternative energy. The State of Nevada is the Saudi Arabia of geothermal. We are waiting for that development. We need certain tax incentives included in the tax portion of this bill.

We would thrive on more solar energy production. That can be done with tax incentives that are in the underlying tax part of this bill. Of course, the Senator from Idaho and I know how much the wind blows in parts of Idaho and Nevada, and we should be using that wind to our own benefit. It is renewable energy.

Even though there are certain things in the bill the Senator from New Mexico produced that I was not wild about, that is what the process is about. Amendments are offered. The Senator from New Mexico had strong feelings about the nuclear portions of this legislation. We had a good debate on that yesterday and a very close vote. That is what the Senate is all about. There are other parts of the bill we are going to try to amend. No one at this stage is trying to stall—I should not say no one. I am sure some people would love this legislation never to come about, but the general belief of the people on this side of the aisle is we should have an Energy bill, and we are going to work toward that end.

Mr. CRAIG. Will the Senator yield?

Mr. REID. I am happy to yield.

Mr. CRAIG. I appreciate those comments. I think we are all frustrated, when we have an issue as mature as this issue is, not to be able to define an arena of amendments and get a unanimous consent agreement that sets a course of action for us. To me, that is what defines progress and ultimate conclusion of what we do on the floor.

As I said earlier, I welcome all amendments that Senators want to have come to the floor. Let's get at the business of debating them and voting on them. When I see an hour quorum call because we cannot get somebody to come to the floor to offer an amendment—and I know the manager of the bill, the chairman of the Energy Committee, has worked mightily to get that done—I have to begin to question what is our intent here.

I am extremely pleased that the Senator from Nevada has recognized the possibility of getting a unanimous consent with a group. I did mention in my remarks that I know the Senator worked to accomplish that, and I appreciate that. But in the absence of doing that, it appears we are wandering a bit in a wilderness of undefinable amendments and no determination as to when we can conclude this process.

It is extremely pleasing to hear we may ultimately get that done because this is a critical issue.

Mr. REID. I will respond to my friend from Idaho. No. 1, we hope to have a list of amendments today sometime before the close of business. No. 2, as the Senator from Idaho knows, as the Senator from New Mexico knows, the lull in the proceedings here is not any fault of the minority. We are waiting for the majority to make a decision as to what they are going to do on the derivatives amendment filed by the Senator from California and the Senator from Illinois.

We are here to do business. We are simply waiting, until a decision is made on derivatives, as to what is the next amendment before us. We have lots of people willing to offer amendments on this side.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). The Senator from New Mexico.

Mr. DOMENICI. Mr. President, first I thank the distinguished Senator from Idaho for his remarks this morning and for his assistance on this bill. I thank him very much.

This morning I want in particular to thank the distinguished minority whip, the Senator from Nevada, for his comments on the floor and his commitment. We are working on a list on our side. We will certainly be ready at the same time or sooner, which means whether we finish by this Friday or not, although we will try mightily once we have the list to wean them down and to move with dispatch. Obviously, we will be on a course to get an Energy bill this year, which is clearly what we want to do. From listening to the minority leader, I have no doubt whatsoever that is what the minority desires to do. I thank him very much for the comments here this morning.

As far as the pending amendment is concerned, it is in our hands at this point. The Senator from California has her prerogative of not wanting to set it aside. We have an obligation to decide what we are going to do with it. We ought to do that pretty soon. Our leadership will make that decision. It is not directly within the jurisdiction of this committee, or I would be making decisions with the leadership. It is more within the jurisdiction of the Agriculture Committee, and the leadership is taking a look.

I understand we have a vote this morning on a judge. Is that correct? That will give leadership a chance to be here in the Chamber, I say to my friend from Nevada, after which time we will make a decision on what we want to do with the pending amendment.

In the meantime, the Senator from New Mexico yields the floor knowing there are others who want to speak to this issue. The junior Senator from Idaho desires to speak. I will yield at this point so he may proceed.

The PRESIDING OFFICER. The Senator from Idaho.

AMENDMENT NO. 876

Mr. CRAPO. Mr. President, I rise to address the Feinstein amendment dealing with derivatives. I think it is a very bad idea. It is one we debated last year and one which is dangerous to our economy.

In order to understand, we have to go back 2 years. Several years ago, Congress wanted to know exactly how our country should approach the regulation of derivatives. As a result of that, and after a few years of study and debate in which a precise time was put together to evaluate the issue, that team came back with recommendations. Those recommendations were enacted by Congress in the Commodity Futures Modernization Act of 2000. This landmark legislation provided certainty with respect to the legal enforceability and regulatory status of swaps and other off-exchange derivatives—what we call over-the-counter derivatives—under the Commodity Exchange Act. The Feinstein amendment would undermine that certainty for OTC derivatives and would impose a new persuasive and unnecessary regulatory regime with respect to OTC derivatives based on energy or on other nonfinancial, nonagricultural commodities.

This act gets complicated, but these commodities are called ''exempt commodities.'' The term is a little bit confusing because it creates the impression sometimes that these commodities are not regulated at all. They are covered fully by the Commodity Futures Modernization Act and by the Commodity Exchange Act. The point is that they are not regulated in the same way that other securities are regulated.

OTC derivatives, including those based on energy, are critical risk management tools. Congress, key financial regulators and others recognize that OTC derivatives are critical tools that are used by businesses, government, and others to manage the financial, commodity, credit and other risks inherent in their core economic activities with a degree of efficiency that would not otherwise be possible.

It is important to state at the outset as we are discussing this issue that we are not talking about transactions that many people think of in securities where they think about investing in a stock in the stock market, a stock that may be regulated under our securities regulations system. These are not transactions that are engaged in by unsophisticated buyers or sellers. These are very sophisticated transactions. Those engaging in these transactions are sophisticated buyers and sellers. They are not the kinds of transactions most people think of when they think of investing in the stock market.

OTC derivatives based on energy products are an especially important tool, allowing market participants to manage risk. In fact, last year when we had Alan Greenspan testify at the Banking Committee, I asked him directly about whether he believed the management of derivatives, the regulation of derivatives, was being properly handled today and whether there was any aspect of our approach to regulating derivatives that led to the Enron

debacle or any of the other problems California faced.

At that time, the answer I got from Mr. Greenspan was that he was not aware of any evidence that indicated the problems we faced in the Enron circumstance were as a result of our regulatory regime for derivatives, and also that it was his opinion the use of derivatives was a very important tool to help to allocate risk in our economy in such a manner that it helped us stabilize and strengthen our economy.

In fact, he even went so far as to say he believed that one reason our economy had not dipped further as we faced a lot of the economic trials and tribulations we have faced in the last couple of years was because of our ability to utilize derivatives and to share and allocate risk in these complicated transactions.

Today, for example, airlines use over-the-counter derivatives to manage their risks with respect to the price and availability of jet fuel. Energy-intensive companies such as aluminum producers use OTC derivatives to hedge their risks of change in the cost of electricity, and energy producers likewise use OTC derivatives to minimize the effects of price volatility.

Again, I reiterate the point that these are complicated, sophisticated transactions being engaged in by very sophisticated participants in the market.

A Wall Street Journal article dated March 10, 2003, entitled ''U.S. Airlines Show Disparity in Hedging for Jet-Fuel Costs,'' illustrated the impacts of using derivatives to hedge in the U.S. airline industry. The article noted that jet fuel, now more than twice as expensive; as a year ago, is emerging as a major factor in survival and bankruptcy for airlines, as several carriers, including some of the weakest, find themselves with few protective price hedges in place.

In other words, these airlines did not effectively utilize the hedging tool, and now they are facing a doubling in the cost of their fuel prices against which they could have hedged. They could have spread that risk if they had used these hedging tools.

Congress should avoid actions that unnecessarily deter the use or increase the cost of these risk management tools.

Key financial regulators also oppose legislation such as this amendment. As I indicated earlier, Alan Greenspan indicated his opposition to increasing or changing the regulatory regime with regard to transactions in OTC derivatives. We are expecting anytime today to get a brandnew response from all of our financial regulators. But last year when this same debate was held, the Chairman of the Board of Governors of the Federal Reserve, the Secretary of the Treasury, the Chairman of the Securities and Exchange Commission, and the Chairman of the Commodity Futures Trading Commission, collectively known as the President's Working Group on Financial Markets, opposed the earlier versions of the amendment we debated.

In a September 18, 2002, letter to Senators CRAPO and MILLER, these regulators highlighted the benefits of OTC derivative noting that ''the OTC derivatives markets in question have been a major contributor to our economy's ability to respond to the stresses and challenges of the last two years.'' The President's working group also observed ''while the derivatives markets may seem far removed from the interests and concerns of consumers, the efficiency gains that these markets have fostered are enormously important to the consumers and to our economy.'' They urged Congress to protect these markets' contributions to the economy and to be aware of the potential unintended consequences of legislative proposals to expand regulation of the OTC derivatives markets, and changing the President's working group proposals which we enacted into law in 2000.

Federal Reserved Chairman Alan Greenspan told the Senate Banking Committee in March of last year that there was:

> a significant downside if we regulate [OTC derivatives based on energy] where we do not have to . . . because if we step in as government regulators, we will remove a considerable amount if the caution that is necessary to allow these markets to evolve. [W]hile it may appear sensible to go in and regulate, all of our experience is that there is a significant downside when you do not allow counterparty surveillance to function in an appropriate manner.

The CFTC does not need new authority to address acts of manipulation that appear to have occurred in California.

One of the arguments we often hear in favor of jumping in and increasing the regulatory scheme with regard to derivatives is that Enron destroyed the energy markets in California and if we had had a tough regulatory regime, that wouldn't have happened.

The CFTC's recent enforcement action against Enron demonstrates that it has adequate tools under the CFMA to address situations such as those, which arose in California. The following enforcement actions have been brought forth by the CFTC this year: No. 1, CFTC charges Enron with price manipulation, operating an illegal, undesignated futures exchange and offering illegal lumber futures contracts through its internet trading platform; No. 2, energy trading company agrees to pay the CFTC $20 million to settle charges of attempted manipulation and false reporting; and No. 3, former natural gas trader charged criminally under the Commodity Exchange Act with intentionally reporting false natural gas price and volume information to energy reporting firms in an attempt to affect prices of natural gas contracts.

The point here is, there is law in place prohibiting the kinds of things that happened in the Enron situation, and those laws are being enforced with criminal penalties being imposed. The fact they are already regulated is apparent. The fact that the acts that occurred in California are the subject of intense regulatory review and criminal enforcement conduct shows we do have regulatory protections in place. The fact there are bad actors who violate the law does not always mean we should necessarily increase the regulatory burdens we face in this country, that our economy deals with in this country.

The CFTC's Division of Enforcement continues to work closely with other Federal law enforcement officers across the country on investigations of possible round-trip trading, false reporting, and fraud and manipulation by energy companies, their affiliates, their employees, or their agents. Again, the point is, there is no evidence that any aspect or lack of aspect in our regulatory regime for the regulation of derivatives had anything to do with the actions of Enron and the occurrences in California that caused such a difficult problem in their energy economy.

There is no evidence that enactment of the CFMA, for example—the 2000 reforms, the modernization of our regulatory system—contributed to the collapse of Enron. Enron's collapse was caused by a failure of corporate governance and controls which, when it became public, led others to refuse to do business with them. As in the case of California, neither the CFTC nor any other key financial regulators has suggested more restrictive regulation of derivatives or derivatives dealers would have prevented the fall of Enron or is needed to prevent future similar events in the future.

The Feinstein amendment would cause more problems than it would cure. This amendment, among other items, would create jurisdictional confusion between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission. It would impose problematic capital requirements to facilities trading in the OTC energy derivatives markets. It would require futures-like reporting and recordkeeping requirements.

It would create both legal and regulatory uncertainty for brokered trading in OTC energy derivatives, as well as OTC derivatives based on other nonfinancial, nonagricultural commodities. It would subject to new regulation a broad range of market participants that have not traditionally been subject to the more intensive CFTC regulation. It would allow the CFTC to regulate any exempt commodity transaction and presumably any market participant that engages in such a transaction in a dealer market. Again, I repeat, these are sophisticated transactions between sophisticated actors in these markets. This proposal would create the very sort of uncertainty that Congress and the Commodity Futures Trading Commission have worked for more than a decade to avoid.

This amendment, in my opinion, is a solution in search of a problem. Since the collapse of Enron and the actions of some market participants to improperly exploit the weaknesses in the California energy price deregulation scheme, remedial actions have occurred on all fronts. The CFTC, the FERC, and others have initiated civil and criminal actions. The Financial Accounting Standards Board has aggressively pursued necessary changes in accounting rules, and private-sector groups have developed and implemented ''best practices'' rules and improved the techniques of managing credit and other risks in the OTC energy derivatives transactions.

The lessons of Enron and of California have been learned. The misdeeds and regulatory violations involving Enron and California have challenged regulators under the existing regulatory structure. Law enforcement agencies and private litigants are dealing with it under the existing regulatory structure. The energy markets are beginning to rebound, and they are becoming less volatile, notwithstanding the current uncertain economy. As a result and because of all this, the Feinstein amendment is little more than a solution in search of a problem, but for reasons I have already mentioned, it is a solution that is dangerous and unnecessary and will put more rigidity into our economy at a time when we need the flexibility and the resilience that will make our economy more dynamic in these difficult times.

Mr. President, there are a lot of other aspects of this debate we need to review before we vote on this amendment. I am hopeful by the end of the day we are going to be in a position where we can, as a Senate, deal with this amendment, as we dealt with it last year, by rejecting it and telling our energy derivatives markets, and all of our OTC derivatives markets, that the current modernized regulatory structure we put into place in 2000, as we follow the President's working group recommendations as to how to deal with these issues, will be maintained and will not be changed, and they can continue to utilize these important financial tools to keep our economy strong and dynamic.

Mr. President, I yield the remainder of my time.

The PRESIDING OFFICER. Who seeks recognition?

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, what is the matter now before the Senate? Is it the Reid amendment to the Feinstein amendment?

The PRESIDING OFFICER. The Reid amendment is the pending question.

AMENDMENT NO. 877, AS MODIFIED

Mr. REID. Mr. President, I have a modification to my amendment which I send to the desk.

The PRESIDING OFFICER. The amendment is so modified.

The amendment (No. 877), as modified, is as follows:

On page 18, strike line 1 and insert the following:

''(10) METALS.—Notwithstanding any other provision of this subsection, an agreement, contract, or transaction in metals—

''(A) shall not be subject to this subsection (as amended by section ___04 of the Energy Policy Act of 2003); and

''(B) shall be subject to this subsection and subsection (h) (as those subsections existed on the day before the date of enactment of the Energy Policy Act of 2003).

''(11) NO EFFECT ON OTHER AUTHORITY.—

Mr. REID. I state, Mr. President, I did this with no one from the majority being here, but it does not take unanimous consent, so I was not trying to take advantage of anyone.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ENZI. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ENZI. Mr. President, I rise to address the overlying amendment pending before us concerning the issue of energy derivatives. I know there is a second-degree amendment to that. I am a little disappointed there is a second-degree amendment to it. I understand why it was done. I know the Senator from California wants to separate off those people who are interested in metals derivatives from those who are interested in energy derivatives. She knows there is considerable interest on both of those parts. So this is a divide-and-conquer strategy, where later they will pick up the metals folks, thinking it will probably work better, because we debated this last year. We debated the same issue. We are back to an amendment that is slightly revised but still not good enough to make it through this body before.

We voted on this and we defeated this. One significant change is the second-degree amendment that takes the metals derivatives out of it. That is clever, but I hope the metals folks don't fall for it because they are next on the list.

The proponents of the amendment believe the trading of derivatives—especially in the energy area—was the cause of energy problems faced by Western States in recent years. The proponents believe energy trading of derivatives by Enron contributed significantly to the energy problem. Unfortunately, the problems that caused Enron to fail were based upon failures in corporate governance and outright fraud. Chairman Greenspan has testified several times before congressional committees that derivatives did not cause the collapse of Enron.

Last year we debated the same issue and we voted it down. The issue of derivatives trading is one of the most complicated and detailed issues to come before us. I have been tempted to see how many of us could even spell derivatives, and we are being called on here to make some major judgments on the issue. If you are a derivatives dealer or a small company that uses derivatives to stabilize revenues, or you are a purchaser of derivatives, this would probably be a stimulating debate. But it is one of those detailed ones, and I think that is why I get to speak on it. It is more the accounting type of thing. Consequently, most people will not be able to understand the implications or even how it operates other than in general details, and I am including myself in that.

I must admit that as chairman of the Securities and Investment Subcommittee of the Banking Committee, I have encountered especially complex market structure orders. However, the issue of derivatives goes beyond those issues. This may have been the most complicated matter I have looked at since I have been in the Senate.

Nobody really knows what a derivative is, including myself. They are very complicated, tailored instruments, each one being unique, which explains why, from the beginning of the trading of derivatives, it has been deregulated. It has never been regulated. In very basic terms, the selling of derivatives is a way for companies that cannot afford risk to pass it on to companies that are willing to accept the risk, to buy the risk. It is a form of corporate insurance. However, beyond this simple definition, the experts should be left to structure and negotiate the instruments. I want to mention that each instrument is unique. That is why it is not traded on the stock market. However, beyond this simple definition, we do need to leave it to the professionals, the ones who understand how this works. And there are professionals out there working on it.

While the amendment before us is very similar to last year's amendment, the changes made to the amendment do not completely solve the underlying problems. In fact, the amendment may have cause for greater confusion as to the jurisdiction of derivatives between the Commodity Futures Trading Commission, the Securities and Exchange Commission, the Office of the Comptroller of the Currency, and the Federal Energy Regulatory Commission.

In 2000, during the debate on the Commodity Futures Modernization Act, we discussed extensively the oversight and regulation of energy derivatives. We concluded that the proper amount of oversight for a new and emerging business had been put into law. I believe we took the proper course. That law gave the Commodity

Futures Trading Commission additional powers to regulate market manipulation where appropriate.

One argument that was made over and over during the debates last year and is being made this year is that somehow the 2000 legislation exempted these derivatives and swaps from regulation. That argument is not true. They never have been regulated. In fact, Congress acted in passing the Futures Trading Practice Act in 1992 to give the Commodity Futures Trading Commission specific power to exempt these derivatives and swaps as being inappropriate for regulation under the Commodity Futures Trading Commission, which has the job of regulating futures—not regulating tailored swaps between sophisticated customers.

The Congress passed the Futures Trading Practice Act in 1992 that directed the Commodity Futures Trading Commission to grant these exemptions. Those exemptions were granted in the previous administration, and the issue was not controversial until we started looking for a scapegoat. Nor have these swaps and derivatives ever come under Federal regulation in terms of an ongoing regulatory process.

Taxpayers take a dislike to the addition of programs to increase tax burden or regulation. This one is regulation. I am reminded of a poem from the play ''Big River'' that describes the emotions of a taxpayer. It goes:

Well you sole selling no-good
Son-of-a-shoe-fittin' firestarter
I ought to tear your no-good
Perambulatory bone frame
And nail it to your government walls
All of you, you Bureaucrats.

There is a concern across this country for bureaucrats setting up regulation, particularly regulation if it is not needed and regulation that is not understood by the regulators.

During his testimony before the Senate Banking Committee last March, Chairman Greenspan reiterated it was crucially important that Congress and Federal regulators permit the derivatives market to evolve amongst professionals who are the most capable of protecting themselves far better than Congress, the Federal Reserve, CFTC, or the Office of the Comptroller of the Currency. Unfortunately, there is a considerable downside for the Federal Government to get involved where the individual private parties are already looking at the economic events of their trading partners.

With respect to the Enron matter, there is no indication that the trading of energy derivatives contributed in any way to the collapse of Enron. Proponents of the amendment argue that Enron had such a large market share of this business that they were able to have undue influence over energy trading. However, to the contrary, during and after Enron's collapse, there were no interruptions of trading. If it had been a disaster, there would have been interruptions, but there were no interruptions of trading. The market continued.

One fear that existed in earlier debates, and still exists today, was that the CFTC did not have the regulatory power to correct abuses in trading of derivatives. However, on page 43 of the Senate companion bill, S. 3283, to the Commodity Futures Modernization Act of 2000, paragraph (4)(B) gives the Commodity Futures Trading Commission the power to intervene and enforce any action where fraud is present.

In listening to proponents of this amendment, one would believe that Federal regulators were powerless in the energy trading markets. Not only does the power exist, but it was strengthened in the 2000 legislation by a provision written into the energy section of the bill in the House of Representatives. In paragraph (4)(C) is a provision relating to price manipulation and that grants the Commodity Futures Trading Commission the power to intervene in cases where price manipulation occurs.

It should be noted that the Commodity Futures Trading Commission on April 9 of this year issued a ''Report on Energy Investigations,'' which details civil and criminal enforcement actions brought in energy-related markets since the passage of the Commodity Futures Modernization Act in 2000. The powers granted to the Commodity Futures Trading Commission appear more than sufficient to oversee market manipulation and, therefore, make the unwieldy regulatory scheme proposed by this amendment unnecessary.

I ask unanimous consent that the entire ''Report of the Energy Investigations'' be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COMMODITY FUTURES TRADING COMMISSION'S REPORT ON ENERGY INVESTIGATIONS—APRIL 9, 2003

The Commodity Futures Trading Commission (the Commission or CFTC) has launched an extensive investigation of alleged misconduct in energy-related markets. To date, the Commission has investigated over 25 energy companies, including Enron and its affiliates, interviewed or taken testimony from over 200 individuals and reviewed in excess of 2 million documents. The Commission's efforts have already resulted in: the filing of three major enforcement actions, two of which were settled with civil monetary penalties totaling $25 million (see discussion below in Section I); related criminal filings (Section II); cooperative enforcement with Federal law enforcement officers; and public outreach efforts (Section IV).

The Commission has devoted significant resources to this investigation, including committing the full-time efforts of 30 staff members, which represents 25 percent of its total enforcement program staff. Through the first six months of fiscal year 2003, above and beyond its human resource costs, the Commission has spent $122,000 on expenses for its energy investigation, which is 30 percent of its enforcement program's total expenses during this time period. The Commission estimates its total energy investigation costs for the entire fiscal year should likely exceed $250,000.

Commission Chairman James E. Newsome, who is a member of the President's Corporate Fraud Task Force, remarked in connection with the commission's filing of an action against two energy companies in December 2002: ''My philosophy has been, and will continue to be, that the Commission has a responsibility to investigate alleged wrongdoing in a comprehensive and timely fashion. And, when violations are found, the Commission will come down hard. Over the course of the past year, the news has been peppered with admissions, accusations, and speculation of wrongdoing in the energy markets and, as a result, I have committed the Commission's resources to finding and punishing the wrongdoers. It is my belief that with the filing and simultaneous settling of this enforcement action, the Commission sends a clear message to all companies that engaged in similar behavior . . . a message that their actions will not be tolerated and that they will be prosecuted and subjected to the full consequences of the law.''

I. CIVIL INJUNCTIVE ACTIONS FILED BY THE COMMISSION

A. ENRON AND FORMER ENRON VICE PRESIDENT CHARGED WITH MANIPULATING PRICES IN NATURAL GAS MARKET; ENRON CHARGED FURTHER WITH OPERATING AN ILLEGAL, UNDESIGNATED FUTURES EXCHANGE AND OFFERING ILLEGAL LUMBER FUTURES CONTRACTS THROUGH ITS INTERNET TRADING PLATFORM

On March 12, 2003, the Commission filed a complaint in federal district court in Houston, Texas, charging defendants Enron Corp. (Enron), an Oregon Corporation headquartered in Houston, and Hunter S. Shively (Shively) of Houston, Texas, with manipulation or attempted manipulation, and charging Enron with operating an illegal futures exchange, and trading an illegal, off-exchange agricultural futures contract.

Until its bankruptcy in December 2001, Enron was one of the largest energy companies in the United States. Its natural gas trading unit was based in Houston and managed several natural gas over-the-counter (OTC) products. Enron's natural gas trading unit was divided into geographical regions and included a natural gas futures desk. Shively was the desk manager for Enron's Central Desk from May 1999 through December 2001.

From November 1999 through at least December 2001, Enron Online (EOL) was Enron's web-based electronic trading platform for wholesale energy, swaps, and other commodities, including the Henry Hub (HH) natural gas next-day spot contract that was delivered at the HH natural gas facility in Louisiana. The HH is the delivery point for the natural gas futures contract traded on the New York Mercantile Exchange (NYMEX), and prices in the HH Spot Market are correlated with the NYMEX natural gas futures contract. During its existence, EOL became a leading platform for natural gas spot and swaps trading.

The complaint charges that on July 19, 2001, Shively, through EOL, caused Enron to purchase an extraordinarily large amount of HH Spot Market natural gas within a short period of time, causing artificial prices in the HH Spot Market and impacting the correlated NYMEX natural gas futures price.

The complaint also charges Enron with operating EOL as an illegal futures exchange from September through December 2001. According to the complaint, in September 2001, Enron modified EOL to effectively allow outside users to post bids and offers. Enron listed at least three swaps on EOL that were commodity futures contracts. The complaint further alleges that with this modification, Enron was required to register or designate EOL with the CFTC or notify the CFTC that EOL was exempt from registration. Enron

failed to do either of these things, and the complaint charges that, because of this failure, EOL operated as an illegal futures exchanged.

Finally, the complaint charges Enron with offering an illegal agricultural futures contract on EOL. According to the complaint, between at least December 2000 and December 2001, Enron offered a product on EOL it called the US Financial Lumber Swap. The complaint alleges that the EOL lumber swap was an agricultural futures contract that was not traded on a designated exchange or otherwise exempt, and therefore was an illegal agricultural futures contract. The CFTC is seeking against each defendant a permanent injunction, civil monetary penalties and other remedial and ancillary relief.

B. EL PASO MERCHANT ENERGY, L.P. SETTLES CLAIMS UNDER THE COMMODITY EXCHANGE ACT THAT IT INTENTIONALLY REPORTED FALSE NATURAL GAS PRICE AND VOLUME INFORMATION TO ENERGY REPORTING FIRMS IN AN ATTEMPT TO AFFECT PRICES OF NATURAL GAS CONTRACTS

On March 25, 2002, the Commission issued an administrative order settling charges of attempted manipulation and false reporting against energy company El Paso Merchant Energy, L.P. (EPME), a division of El Paso Corporation (El Paso). The CFTC settlement order finds that from at least June 2000 through November 2001, EPME reported false natural gas trading information, including price and volume information, and failed to report actual trading information, to certain reporting firms. According to the order, price and volume information is used by the reporting firms in calculating published indexes of natural gas prices for various hubs throughout the United States. The order finds that EPME knowingly submitted false information to the reporting firms in an attempt to skew those indexes for EPME's financial benefit. According to the order, natural gas futures traders refer to the published indexes for price discovery and for assessing price risks. The CFTC found that EPMS's false reporting conduct violated the Commodity Exchange Act (CEA).

The order also finds that EPME's employees provided false trade data because they believed it benefited their trading positions or derivative contracts. In addition, the order finds that EPME did not maintain required records concerning the information that it provided to the reporting firms or the true source of the information related to those firms, as required by Commission regulations. As a result of its actions, EPME violated the CEA and Commission regulations.

The order further finds that EPME specifically intended to report false or misleading or knowingly inaccurate market information concerning, among other things, trade prices and volumes, and withheld true market information, in an attempt to manipulate the price of natural gas in interstate commerce, and that EPME's provision of the false reports and failure to report true market information were overt acts that furthered the attempted manipulation. According to the order, EPME's conduct constituted an attempted manipulation under the CEA, which, if successful, could have affected prices of NYMEX natural gas futures contracts.

The CFTC order imposed the following sanctions: required EPME to cease and desist from further violations of the EA and Regulations; required EPME and El Paso, jointly and severally, to pay a civil monetary penalty of $20 milliion—$10 million immediately and $10 million plus post-judgment interest within three years of the entry of the order; and obliged EPME and El Paso to comply with various undertakings, including an undertaking to cooperate with the Commission in this and related matters, including any investigations of matters involving the reporting of natural gas trading information.

EPME provided significant cooperation in the course of the Commission's investigation by, among other things, conducting an internal investigation through an independent law firm, waiving work product privilege as to the results of that investigation, and compiling and analyzing trading data which detailed all reported and actual trades in the natural gas markets. The Commission took that significant cooperation into consideration in its decision to accept EPME's settlement offer.

C. DYNEGY MARKETING & TRADE AND WEST COAST LLC SETTLE CLAIMS UNDER THE COMMODITY EXCHANGE ACT THAT THE INTENTIONALLY REPORTED FALSE NATURAL GAS PRICE AND VOLUME INFORMATION TO ENERGY REPORTING FIRMS IN AN ATTEMPT TO AFFECT PRICES OF NATURAL GAS CONTRACTS

On December 19, 2002, the Commission issued an administrative order settling charges of attempted manipulation and false reporting against energy companies Dynegy Marketing & Trade (Dynegy) and West Coast Power LLC (West Coast). The CFTC settlement order finds that from at least January 2000 through June 2002, Dynegy and West Coast reported false natural gas trading information, including price and volume information, to certain reporting firms. According to the order, price and volume information is used by the reporting firms in calculating published surveys or indexes (indexes) of natural gas prices for various hubs throughout the United States. The order finds that Dynegy knowingly submitted false information to the reporting firms in an attempt to skew those indexes for Dynegy's financial benefit. According to the order, natural gas futures traders refer to the published indexes for price discovery and for assessing price risks. The CFTC found that Dynegy's false reporting conduct violated the CEA.

The order further finds that in an effort to ensure that its reported information would be used by the reporting firms, Dynegy caused West Coast to submit information misrepresenting that West Coast was a counterparty to fictitious trades. In addition, the order finds that Dynegy did not maintain required records concerning the information which it provided to the reporting firms or the true source of the information relayed to those firms, as required by Commission Regulations. As a result of their actions, Respondents violated the CEA and Commission Regulations.

The order further finds that Respondents specifically intended to report false or misleading or knowingly inaccurate market information concerning, among other things, trade prices and volumes, to manipulate the price of natural gas in interstate commerce, and that Respondents' provision of the false reports and their collusion, which was designed to thwart the reporting firms' detection of the false information, were overt acts that furthered the attempted manipulation. According to the order, Respondents' conduct constitutes an attempted manipulation under the CEA, which if successful, could have affected prices of NYMEX natural gas futures contracts.

The CFTC order imposed the following sanctions: required Dynegy and West Coast to cease and desist from further violations of the CEA and Regulations; required Dynegy and West Coast, jointly and severally, to pay a civil monetary of $5,000,000; and obliged Dynegy and West Coast to comply with their undertakings, including an undertaking to cooperate with the CFTC in this and related matters.

II. RELATED CRIMINAL ACTIONS

A. ENRON'S FORMER CHIEF ENERGY TRADER PLED GUILTY TO CONSPIRACY TO COMMIT WIRE FRAUD IN SCHEME TO MANIPULATE ENERGY MARKET

On October 17, 2002 the Office of the United States Attorney for the Northern District of California announced that Timothy N. Belden, who was Enron's Chief Energy Trader, had agreed to plead guilty to conspiracy to commit wire fraud in a scheme with others at Enron to manipulate California's energy market. Specifically, Belden admitted that beginning in approximately 1998, and continuing through 2001, he and others at Enron conspired to manipulate the energy markets in California by: (1) misrepresenting the nature and amount of electricity Enron proposed to supply in the California market, as well as the load it intended to serve; (2) creating false congestion and falsely relieving that congestion on California transmission lines, and otherwise manipulating fees it would receive for relieving congestion; (3) misrepresenting that energy was from out-of-state to avoid federally approved price caps, when in fact, the energy it was selling was from the State of California and had been exported and re-imported; and (4) falsely represented that Enron intended to supply energy and ancillary services it did not in fact have and did not intend to supply. A sentencing date has yet to be scheduled for Belden, but a status hearing in his case is set for April 17, 2003. In announcing the plea agreement, the efforts of the Commission, Federal Energy Regulatory Commission (FERC) and Federal Bureau of Investigation (FBI) were recognized.

B. FORMER HEAD OF ENRON'S SHORT-TERM CALIFORNIA ENERGY TRADING DESK PLED GUILTY TO CRIMINAL CHARGES BASED UPON HIS AND OTHER ENRON TRADERS' CRIMINAL MANIPULATION OF THE CALIFORNIA ENERGY MARKETS

On February 4, 2003 the Office of the United States Attorney for the Northern District of California announced that Jeffrey S. Richter, who was the head of Enron's Short-Term California energy trading desk, had agreed to plead guilty to conspiracy to commit wire fraud in a scheme with others at Enron to manipulate California's energy markets and also to making false statements to investigators. Specifically, Belden admitted to making false statements to the FBI and U.S. Attorneys Office during the continuing investigation into fraudulent trading practices in those markets. Specifically, Richter admitted his participation on behalf of Enron in two fraudulent schemes devised by Enron traders, known internally within Enron as ''Load Shift'' and ''Get Shorty.'' Enron's ''Load Shift'' trading scheme involved the filing of false power schedules to increase prices by creating the appearance of ''congestion'' on California's transmission lines, which permitted Enron to profit through its ownership of transmission rights on the lines and by offering to ''relieve'' the congestion through subsequent schedules. Enron's ''Get Shorty'' trading scheme involved the company's traders fabricated and sold emergency back-up power (known as ancillary services) to the California Independent Service Operator, received payment, then cancelled the schedules and covered their commitments by purchasing through a cheaper market closer to the time of delivery. In announcing the plea agreement, the efforts of the Commission, FERC, FBI, and the Antitrust Division of the Department of Justice were recognized.

C. FORMER DYNEGY NATIONAL GAS TRADER CHARGED CRIMINALLY UNDER THE COMMODITY EXCHANGE ACT WITH INTENTIONALLY REPORTING FALSE NATURAL GAS PRICE AND VOLUME INFORMATION TO ENERGY REPORTING FIRMS IN AN ATTEMPT TO AFFECT PRICES OF NATURAL GAS CONTRACTS

On January 27, 2003 the Office of the United States Attorney for the Southern District of Texas, Houston Division, unsealed a seven count federal indictment charging Michelle Valencia, a former Senior Trader at Dynegy, with three counts of false reporting under the CEA. Additionally, Valencia was charged with four counts of wire fraud. The indictment alleges that on three separate occasions in November 2000, January 2001 and February 2001, Valencia, responsible for trading natural gas through Dynegy's ''West Desk'' caused the transmission of a report which include price and volume data to certain publications knowing that the trades had not actually occurred. In announcing the indictment, the efforts of the Commission and the FBI were recognized.

III. COOPERATIVE ENFORCEMENT—COMMISSION SEMINAR WITH FEDERAL LAW ENFORCEMENT OFFICERS ON ENERGY MARKETS

On February 12, 2003 the Commission hosted forty federal criminal law enforcement officers at a cooperative enforcement session on current issues in energy investigations. Attending were Assistant United States Attorneys, Federal Bureau of Investigation agents, and United States Postal Inspectors. The Commission's Division of Enforcement, which coordinated the program, has been working closely with other federal law enforcement officers across the country on investigations of possible round-trip trading, false reporting, and fraud and manipulation by energy companies and their affiliates, employees and agents. The meeting was designed to share expertise, and to discuss ways for federal enforcers to cooperate in these inquiries.

IV. PUBLIC OUTREACH

In carrying out its regulatory and enforcement responsibilities under the CEA, the Commission relies upon the public as an important source of information. A questionnaire, available by clicking on the Enron Information link on the CFTC's homepage at www.cftc.gov, has been prepared by the CFTC's Division of Enforcement to assist members of the public in reporting suspicious activities or transactions involving Enron, its subsidiaries, affiliates, or related entities. The Division is also interested in receiving information relating to suspicious activities or transactions that may have affect West coast electricity or natural gas prices, particularly in January 2000 through December 31, 2001. Interested person can also call the Commission's toll-free voice mailbox and leaving relevant information at (866) 616–1783.

Mr. ENZI. Mr. President, I believe the amendment is overly broad and, if adopted, will likely decrease market liquidity because of increased legal and transactional uncertainties. Additionally, energy companies may be discouraged from using derivatives to hedge price risks, resulting in increased volatility in the energy markets. In the end, I believe this will hurt the very consumers the legislation seeks to help.

The amendment appears to grant the Federal Energy Regulatory Commission primary jurisdiction over energy derivatives, but if the Federal Energy Regulatory Commission determines that the derivative or financial instrument is not under its jurisdiction, then the Federal Energy Regulatory Commission should refer the derivative or financial instrument to the appropriate Federal regulator. Unfortunately, this will create great uncertainty for market participants as to which agency's regulatory scheme the derivative would fall under.

I recently was involved in some pipeline questions and ran into the circular path of fingerpointing where each agency said the other agency and the other agency and the other agency was responsible until it pointed back to the first agency, and nobody would look at the problem. That is the kind of circular problem we are creating with this amendment.

In addition, it goes without saying that Federal agencies want to expand their jurisdiction and get bigger. It should be noted that while the Federal Energy Regulatory Commission seeks to expand its authority to regulate these energy derivatives markets, other Federal agencies, particularly the financial regulatory agencies, believe such a regulatory scheme would be detrimental to the market.

The amendment also would subject to regulation a broad class of ''covered entities,'' including both electronic trading facilities and ''dealer markets'' that are not otherwise trading facilities. As discussed above, this definition may be too broad as to deter participants from entering the trading markets.

In addition, the amendment would permit CFTC to impose notice, reporting, price dissemination, record-keeping, among other requirements. Not only would these requirements apply to dealer markets, but also to exemption commodity transactions on such an entity.

The secondary amendment that would exempt metals from the proposed regulatory scheme of the underlying amendment is not a good idea. Congress should be very cautious about carve-outs without fully understanding the implications. With regard to metals, Congress may start down a slippery slope where this initial carve-out is for the metals industry and then move on to other industries. I believe we need to explore this in the committees before having it considered on the floor. Therefore, I urge Members to resist the free vote without knowing all the consequences.

Letters were recently sent to the Senate Energy Committee by the Chicago Board of Trade, the Chicago Mercantile Exchange, and the New York Mercantile Exchange opposing legislation introduced this Congress that is very similar to the amendment before us.

Various other groups have been outspoken about this amendment, including the National Mining Association, the International Swaps and Derivatives Association, and the Bond Market Association, just to name a few. In addition, during last year's debate on the Energy bill, the President's working group, comprised of the Chairman of the Board of Governors of the Federal Reserve, the Secretary of the Department of the Treasury, the Chairman of the SEC, the Chairman of the CFTC, opposed a similar amendment and we defeated it. Individually, the Chairman of the CFTC and the then-Chairman of the SEC sent letters directly to me opposing the energy derivative amendment.

On the overall topic of derivatives, Chairman Greenspan stated:

> Although the benefits and costs of derivatives remain the subject of spirited debate, the performance of the economy and the financial system in recent years suggests that these benefits have materially exceeded the costs.

If the proponents of this amendment are attempting to remedy the problems caused by Enron, I do not believe this amendment will make a difference to prevent future Enrons. However, if last year's Sarbanes-Oxley Act had been in place sooner, then the corporate governance requirements of the act may have served as an early warning system to Enron's audit committee and have covered the fraudulent activities early in the process.

What I am saying is, we corrected the fraudulent problem. I am very concerned that if we adopt this amendment, we may fundamentally change the emerging derivatives market. Once the structure is in place, it may place such a burden on the market participants that it may not be worthwhile to pursue. In addition, the amendment may have caused unintentional confusion as to which regulator may or may not oversee individual participants or components of the marketplace. Before we make any fundamental change, we should, at a minimum, try to understand the ramifications first.

I am afraid this amendment might fit under the congressional precept that if it is worth reacting to, it is worth overreacting to, and that is something we have to avoid if we want to make sure that the markets continue to exist. Like Chairman Greenspan, I believe the derivative trading, even in the energy derivative area, has been extremely beneficial to our economy and I hope we continue it.

I request that Members vote against the overlying amendment.

I ask unanimous consent that a letter from Jack Gerard of NMA be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL MINING ASSOCIATION,
Washington, DC, June 11, 2003.

Hon. MIKE ENZI,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR ENZI: The National Mining association opposes attempts by Senator Feinstein or Senator Levin to further regulate the derivatives OTC market. Over the Counter derivatives including those based on energy and metals are critical risk management tools.

We appreciate Senator Reid's positive work to exclude metals from the pending amendment, but continue to oppose the Feinstein or Levin amendments which unnecessarily increases regulation of the OTC energy derivatives.

Attached are additional talking points generated by us and our partners in the financial community. Thank you for your interest.

Sincerely,

JACK GERARD.

Hon. BILL FRIST,
Majority Leader, U.S. Senate,
Washington, DC.
Hon. TOM DASCHLE,
Democratic Leader, U.S. Senate,
Washington, DC.

THE HONORABLE BILL FRIST AND THE HONORABLE TOM DASCHLE: We urge you to oppose any financial derivatives, energy derivatives, metals derivatives and energy trading market provisions contained in S. 509 that may be offered as amendments by Senator Feinstein to H.R. 6, the Energy Policy Act of 2003.

The provisions of S. 509 (introduced by Senator Feinstein in March and referred to the Senate Agriculture Committee) include, in addition to other problematic provisions, language that would expand FERC jurisdiction, creating uncertainty and unnecessary jurisdictional confusion between the FERC and CFTC for financial and energy derivatives transactions. The amendment also contains specific provisions to expand FERC jurisdiction over ''other financial transactions.'' In addition to creating legal uncertainty within the OTC derivatives markets, this provision would potentially call into question the CFTC's exclusive jurisdiction over futures and options on futures.

Provisions contained in S. 509 are similar to the Feinstein amendment, which was offered to last year's Senate energy bill. The amendment was defeated in a cloture motion on April 10, 2002. In addition, key financial regulators have also opposed these types of provisions. The Chairman of the Board of Governors of the Federal Reserve, the Secretary of the Treasury, the Chairman of the Securities and Exchange Commission and the Chairman of the Commodity Futures Trading Commission, collectively known as the President's Working Group on Financial Markets (PWG), all opposed earlier versions of the proposed legislation.

We ask that you preserve the legal activity achieved with passage of the Commodity Futures Modernization Act of 2000 and oppose any amendments relating to financial derivatives and the energy trading markets.

Sincerely,

American Bankers Association, ABA Securities Association, Association for Financial Professionals, The Bond Market Association, Emerging Markets Trade Association, Financial Services Roundtable, The Foreign Exchange Committee, Futures Industry Association, International Swaps and Derivatives Association, Managed Funds Association, National Mining Association, Securities Industry Association.

1. WHAT ARE DERIVATIVES?

The term ''derivatives'' refers to a wide array of privately negotiated over-the-counter (''OTC'') and exchange traded transactions. Over the last decade, OTC derivatives transactions have grown to include not only interest rate and currency swaps, but also interest rate caps, collars and floors, swap options, commodity price swaps, equity swaps, credit derivatives, weather derivatives and other financial derivative products.

2. WHAT IS THE OVER-THE-COUNTER MARKET?

The OTC market is the principals' market whereby business is transacted directly between the buyer and seller. There is no middleman, exchange or clearinghouse involved. The OTC market now sees most of the derivative activity, and dwarfs the exchanges.

3. WHY DO COMPANIES USE DERIVATIVES?

Companies use derivatives to manage risk and enhance profit potential. Derivatives have been around since the 1970s and generally have been regarded as efficient tools that lend stability to business operations. Corporations typically use them to reduce risk from swings in currency values or interest rate movements.

4. ARE DERIVATIVES IMPORTANT TO THE MINING INDUSTRY?

Since 1974, when the Commodity Exchange Act (CEA) was enacted by Congress, derivatives have become very important to the metals mining industry as a method to protect against market volatility. Many of these products did not exist when the Act was first adopted. These derivatives play a key role in the metals hedging programs that gold producers have used in periods of declining gold prices to sell their production forward. Miners of other metals commodities also use derivatives to manage the risk of fluctuating prices. Since their creation, these metals derivatives products have always been sold over-the-counter, mainly because the transactions occur between or among large institutions and high worth companies and the products can be customized for the particular needs of the parties.

5. HOW HAVE DERIVATIVES BENEFITED MARKET PARTICIPANTS?

The growth of the derivatives market has been of considerable benefit to users individually. In the gold sector, central banks have been able to earn income on gold holdings, while gold fabricators have been able to insulate themselves from the impact of fluctuations in the price of gold on their inventory holdings. Hedging has enabled producers to develop new mines using project finance.

6. HOW WOULD A COMPANY USE DERIVATIVES TO HEDGE THEIR MINE PRODUCTION?

A hedging program will typically include a mix of over-the-counter derivative products, including ''Forward Sales'' and ''Spot Deferred Contracts.'' For example, in a spot deferred contract a bullion dealer borrows gold from a central bank, and sells it into the spot market at a price of $350 per ounce. The proceeds are placed on deposit and earn interest of 4%. A fee of 1% is paid by the bullion dealer to the central bank. The interest difference of 3.0% is called ''contango.'' The mining company receives the original proceeds from the spot sale ($350) plus the five years of accrued interest ($56) for a total amount of $406 per ounce.

TALKING POINTS FOR FEINSTEIN AMENDMENT TO SENATE ENERGY BILL

Senator Feinstein is offering an amendment to the comprehensive energy bill which is now being considered on the Senate floor. This amendment would subject OTC energy derivatives to comprehensive, exchange-type regulation including capital requirements.

Although Senator Feinstein has made some changes to her original legislation as introduced, these are not significant and do not address the concerns we have raised with you and others.

The legislation still contains inappropriate layers of regulation, including capital requirements for electronic exchanges that only bring parties together and have no role in any resulting transactions. This amount of regulation sends the business offshore.

The legislation creates legal uncertainty by giving the CFTC vastly expanded and undefined jurisdiction over all types of commodities transactions, not just futures contracts. The clarity of CFTC jurisdiction, and accompanying legal certainty that transactions will not be deemed illegal and voidable, created by the CFMA enacted in 2000 is destroyed.

Legal uncertainty is compounded by the fact that FERC now has a role that is supposedly dependent on whether energy is actually delivered. However, the decision whether to deliver energy may be made years after the transaction is entered into, leaving the parties uncertain during the life of the contract which agency has jurisdiction.

Message: Oppose the Feinstein Amendment. If action needs to be taken, it should be done in a thoughtful, deliberate manner through the Committee process, not as a floor amendment.

Mr. ENZI. I yield the floor.

EXECUTIVE SESSION

NOMINATION OF RICHARD C. WESLEY TO BE UNITED STATES CIRCUIT JUDGE FOR THE SECOND CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session to consider Executive Calendar No. 220, which the clerk will report.

The assistant legislative clerk read the nomination of Richard C. Wesley, of New York, to be United States Circuit Judge for the Second Circuit.

The PRESIDING OFFICER. Who yields time?

The Senator from Vermont.

Mr. LEAHY. Mr. President, I yield myself time.

As the two distinguished Senators from New York are in the Chamber, I will yield my time to them adding only this: This is a nominee to one of the most important courts in the country. It is actually my circuit. It is a Republican nominee, nominated by a Republican President. I predict that the nominee is going to go through easily because, contrary to the normal procedure on some of these nominees, the White House has sent up somebody who can unite us, not divide us. Usually they send nominees who divide us and not unite us. This is an example of what happens when a nominee to a powerful court is sent up who will unite us and not divide us.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from New York.

Mr. SCHUMER. Mr. President, I join my colleague from Vermont and my colleague from New York in supporting the nomination of Judge Wesley.

I rise in enthusiastic support of Richard Wesley's nomination to the Second Circuit Court of Appeals.

Like most of the nominees we see, Judge Wesley has a top-flight legal mind and experience. He graduated from SUNY-Albany summa cum laude